

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS  
ON REFERRAL BY THE COMMISSIONER OF REVENUE**

IN THE MATTER OF	)	
A & J C	)	Case No. OAH 11-0287-PFD
and their child, A	)	Agency No. 2010-18-9715
	)	& 2011-014-3649
<u>2010 &amp; 2011 Permanent Fund Dividends</u>	)	

**DECISION & ORDER**

**I. Introduction**

A and J C timely applied for 2010 and 2011 permanent fund dividends for themselves and their child, A. The Permanent Fund Dividend Division determined that the applicants were not eligible, and it denied the applications initially and in the case of their 2011 PFDs, at the informal appeal level. The Cs requested a formal hearing. Administrative Law Judge Mark T. Handley heard the appeal on August 30, 2011. Mr. C appeared by telephone. Pete Scott represented the PFD Division by telephone. The administrative law judge finds the applicants to be eligible for a 2011 dividend, but grants the Division's motion to dismiss the Cs' appeal of the denial of their 2010 PFDs.

**II. Facts**

The Cs' both lived in Alaska when they were children. After they were married, the Cs' left Alaska when Mr. C was transferred out of Alaska in November of 2003. The Cs continued to return to visit their families in Alaska and continued to receive PFDs during their extended absence from Alaska due to Mr. Cs' service in the U.S. Air Force. Between 2005 and September of 2009, Mr. C had fifteen surgeries for lower gastrointestinal bleeding and infections. In between these surgeries, Mr. C had periods of convalescence as well as periods of illness while he was waiting for additional surgery to be scheduled.<sup>1</sup>

The Cs did not receive the 2008 PFD because they had not been present in Alaska for 72 consecutive hours during the two prior years. The Cs did not receive the 2010 PFD, because the Division determined that they failed to demonstrate that they had maintained the intent to return to Alaska during their extended absence. Mr. and Ms. C did not appeal this decision until after their 2011 PFD applications were denied. They both lived in Alaska for longer than their absence. The Cs have returned to Alaska for only 25 days in the last five years before 2011. Those 25 days were for two Christmas trips in 2009 and 2010, after Mr. Cs' medical problems were finally resolved.

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<sup>1</sup> Exhibits 1-3 & Recording of Hearing- Testimony of Mr. C.

The Cs had planned to visit Alaska in 2007 but Mr. Cs' medical problems forced them to change those plans.<sup>2</sup>

Before their seven year absence, the Cs clearly established residency in Alaska. The Cs registered to vote in Alaska, obtained drivers' licenses, and registered their vehicles in Alaska. Alaska was listed as the state of legal residence in Mr. Cs' employment records. The Cs maintained some of these ties during the seven years that they lived outside Alaska, but they also established a very significant residency tie to another state. They purchased a house in the State of Florida where they now live. The Cs have, however, been stationed in different states during their extended absence and, with the exception of the purchase of the Florida house, do not appear to have established significant ties of residency outside Alaska.<sup>3</sup>

Mr. C was under orders from the military during their seven year absence. At the hearing, Mr. C explained that he was appealing the Division's denial of their 2010 and 2011 PFD application because they had maintained their intent to return to Alaska. Mr. C explained that they had planned to return to Alaska in 2009 when his last tour of duty ended, but he later decided to re-enlist, and was not assigned to Alaska. Mr. C also explained that he has tried to get re-assigned to Alaska. There are only two slots for his position in Alaska, and he was not offered a tour in Alaska. The Cs had to choose between Nebraska and Florida for their present tour of duty.

The C' had a difficult move from Texas to Florida when he started his new tour of duty. Alaska is still Mr. C' home of record, so the military will pay to have his household goods returned to Alaska when the tour ends. The Cs plan to visit family in Alaska next summer. The Cs did not get their 2010 PFD denial letter because of problem with their mail.<sup>4</sup>

### **III. Discussion**

#### *Motion to Dismiss appeal of 2010 PFD Denials*

The Division filed a motion to dismiss the Cs' appeals of the denial of their 2010 PFD applications because those appeals were filed long after the appeal deadline. A person who wishes to appeal the denial of a permanent fund dividend must file a request for a hearing within thirty days of the day the division denies the application.<sup>5</sup> This deadline may be waived if strict adherence to the normal appeal deadlines would work an injustice.<sup>6</sup>

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<sup>2</sup> Division's Pre Hearing Brief, Exhibit 12 & Recording of Hearing- Testimony of Mr. C.

<sup>3</sup> Exhibit 3 & 10 & Recording of Hearing- Testimony of Mr. C.

<sup>4</sup> Recording of Hearing- Testimony of Mr. C.

<sup>5</sup> 15 AAC 05.010(b)(5).

<sup>6</sup> 15 AAC 05.030(k).

The Division issued its denial letter on the Cs' 2010 PFD applications on May 28, 2010.<sup>7</sup> The Cs' appeal request was filed 351 days later, which is almost a year after the passing of the 30-day appeal deadline. Mr. C explained that they never received the denial due to problems with their mail. Mr. C admitted that they noticed that they did not receive 2010 PFDs.

The Cs' 2008 PFDs were denied because of the 72 hour rule. The Cs therefore had had some previous exposure to denial and appeals process for PFD applications. The Cs' simply failed to pursue their claim for 2010 PFDs with sufficient diligence. Under these circumstances, there is no apparent injustice that would be worked by strict adherence to the appeal deadlines. The Division's motion to dismiss the Cs' late appeals of the Division's denial of their 2010 PFD applications should therefore be granted.

*No Collateral Estoppel on the Issue of Cs' Alaska Residency*

The Division argued that Cs are not eligible for 2011 PFDs because they were denied 2010 PFDs for failing to overcome the presumption that they had not maintained their intent to return to Alaska during their extended absence. The Division maintains that since the Cs did not timely appeal this finding they lost their residency for PFD purposes and would have to return to Alaska to reestablish residency before they would again be eligible for PFDs during their extended absence for military service.

The Division's analysis of the PFD eligibility requirements as they apply to the Cs' situation would be correct but for the conclusion that the Cs' failure to timely appeal their 2010 PFD denials prevents them from attempting to show that they maintained their Alaska residency.

A recent Alaska Supreme Court decision reviewed an administrative PFD appeal where the applicant had failed to file a formal hearing appeal on a residency issue for a prior PFD denial. The Administrative Law Judge had concluded that the applicant's failure to appeal had the effect of deciding the residency issue for the purpose of his eligibility for the later PFD denial. The applicant was not able to argue that he had maintained his intent to return to Alaska because his failure to maintain that intent had been the basis for the denial of a past PFD, which had not been appealed to the formal hearing level. The Alaska Supreme Court upheld a decision by an Administrative Law Judge. In that case, however, the applicant had requested an informal appeal for the past PFD, in which the residency issue was decided.<sup>8</sup>

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<sup>7</sup> Exhibit 5, page 2.

<sup>8</sup> *Harrod v. State, Dept. of Revenue*, 255 P.3d 991, 1000 (Alaska 2011).

The C did not have an informal appeal on their 2010 PFD eligibility. Instead their eligibility was decided in a letter of denial that they did not timely appeal. The C' late appeal of that letter of denial is now being dismissed at the Division's request. A letter of denial is not an adequate administrative substitute for judicial procedure that would be fair to give preclusive effect. Unlike an informal appeal, the administrative process that results in a letter of denial generally does not allow the applicant an opportunity to present arguments and facts. The C did not have an opportunity to do either before the denial letter was issued.<sup>9</sup>

#### *Eligibility for 2011 PFDs*

A person who has been allowably absent for more than five years is, by law, presumably not an Alaska resident anymore.<sup>10</sup> If an applicant attempts to overcome this presumption, the Division may rely on the following factors when making a decision:<sup>11</sup>

- (1) the length of the individual's absence compared to the time the individual spent in Alaska before departing on the absence;
- (2) the frequency and duration of return trips to Alaska during the absence; the fact that the individual has returned to Alaska in order to meet the physical presence requirement of AS 43.23.005 (a)(4) is not sufficient in itself to rebut the presumption of ineligibility;
- (3) whether the individual's intent to return or remain is conditioned upon future events beyond the individual's control, such as economics or finding a job in Alaska;
- (4) any ties the individual has established outside Alaska, such as maintenance of homes, payment of resident taxes, vehicle registrations, voter registration, driver's licenses, or receipt of benefits under a claim of residency in another state;
- (5) the priority the individual gave Alaska on an employment assignment preference list, such as those used by military personnel;
- (6) whether the individual made a career choice or chose a career path that does not allow the individual to reside in Alaska or return to Alaska; and
- (7) any ties the individual has maintained in Alaska, such as ownership of real and personal property, voter registration, professional and business licenses, and any other factors demonstrating the individual's intent.

When considering these factors, the Division must “give greater weight to the claim of an individual who makes frequent voluntary return trips to Alaska during the period of the individual’s absence

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<sup>9</sup> Other formal hearing decisions in PFD appeals have declined to give preclusive effect to a factual issue that formed the basis of a denial letter for a prior PFD that was not appealed. *See for example, In The Matter of S.A*, OAH No. 07-0690-PFD.

<sup>10</sup> 15 AAC 23.163(f).

than to the claim of an individual who does not.”<sup>12</sup> In considering what constitutes “frequent” return trips, thirty days in five years is provided as the minimum that would generally be expected from someone who maintained the requisite intent to maintain Alaska residency during such an extended absence. Unless unavoidable circumstances have prevented return trips, the Division must “generally consider that an individual who has not been physically present in Alaska for at least 30 cumulative days during the past five years has not rebutted the presumption” that he is no longer an Alaska resident.<sup>13</sup> The final rule governing this case is that a person requesting a formal hearing has the burden of proving that the Division’s decision was in error.<sup>14</sup>

The regulation creating the measure of thirty days in five years provides a guideline for measuring the likelihood that a person consistently maintains intent to move back to Alaska during an extended absence. While it does not create an absolute rule that those who do not return for at least thirty days in the past five years are not eligible, it is a rare case when an applicant will be able to present persuasive evidence of intent to return to Alaska that will overcome this presumption. The 30-day rule provides a test for measuring a person’s probable subjective intent in the context of their maintenance of Alaska residency during an extended absence.

The evidence presented at the hearing, however, showed that this is one of those rare cases. The Cs are long-time Alaskan residents, and given their history of spending about two weeks every two years visiting with their relatives in Alaska, it was probably Mr. Cs’ medical problems rather than a waning interest in returning to Alaska, that led to their missing a visit back to Alaska in 2007, which made them ineligible for the 2008 PFD and brought their total in the years that preceded 2011 down below 30 days. The Cs planned return in 2007 was right in the middle of Mr. Cline’s medical problems. Once Mr. Cs’ medical problems were resolved in 2009 they returned to spend time with family in Alaska in both 2009 and 2010, and they plan to come again for vacation in the summer of 2012. The Cs have made an effort to maintain their ties of residency in Alaska. The purchase of their home in Florida does not appear to indicate that they intend to remain in that state. Mr. C explained that it was less expensive to buy a house than rent one close to his duty station.

#### **IV. Conclusion**

Considering all the evidence in this case, I find that Mr. and Ms. C have rebutted the presumption that they failed to maintain the intent to return to Alaska to remain indefinitely and

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<sup>11</sup> 15 AAC 23.163(g).

<sup>12</sup> 15 AAC 23.163(h)(1).

<sup>13</sup> 15 AAC 23.163(h)(2).

<sup>14</sup> 15 AAC 05.030(h).

make their home at all times when they were living outside the state, but they did not show that it would work an injustice to strictly apply the appeal deadline to their late appeal of the denial of their 2010 PFD applications.

**V. Order**

IT IS HEREBY ORDERED that the Division’s motion to dismiss the appeal of its denial of the applications of A and J C for 2010 permanent fund dividends for themselves and their child, A, is GRANTED, but the denial of their applications for 2011 PFDs is OVERTURNED. A and J C and their child, A are eligible for 2011 PFDs.

DATED this 14<sup>th</sup> day of September, 2011.

By: Signed  
Mark T. Handley  
Administrative Law Judge

**Adoption**

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 13<sup>th</sup> day of October, 2011.

By: Signed  
Signature  
Mark T. Handley  
Name  
Administrative Law Judge  
Title

[This document has been modified to conform to the technical standards for publication.]